STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO.: CRT 6101-03
DCR DOCKET NO.: EN12WE-46074-E
DATED: November 10, 2005

KATHLEEN CONNORS RYAN,	)	
	)	
Complainant,	)	**ADMINISTRATIVE ACTION**
	)	
v.	)	**FINDINGS, DETERMINATION**
	)	
FREEHOLD REGIONAL HIGH SCHOOL DISTRICT,	)	**AND ORDER**
	)	
Respondent.	)	
	)	

APPEARANCES:

Joyce Wan, Deputy Attorney General, prosecuting this matter on behalf of the New Jersey Division on Civil Rights *(Peter C. Harvey, Attorney General of New Jersey*, attorney), for the complainant.

Allan P. Dzwilewski, Esq. (*Schwartz Simon Edelstein Celso & Kessler LLP,* attorneys), for the respondent.

BY THE DIRECTOR:

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by Kathleen Connors Ryan (Complainant), alleging that the Freehold Regional High School District (Respondent), subjected her to unlawful discrimination in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49 and unlawful reprisal in violation of the New Jersey Family Leave Act (FLA), N.J.S.A. 34:11B-1 to -16. On May 12, 2005, the Honorable Joseph F. Fidler, Administrative Law Judge (ALJ), issued an initial

decision[1] crediting the allegations of unlawful discrimination and reprisal and awarding Complainant compensatory damages and equitable relief and imposing a statutory penalty. Having independently reviewed the record, the Director adopts the ALJ's decision, as modified herein.

PROCEDURAL HISTORY

On July 24, 2000, Complainant filed a verified complaint with the Division alleging that Respondent refused to hire her based on her sex and in reprisal for a prior discrimination complaint, in violation of the LAD. The complaint was amended on February 7, 2001 to allege that Respondent refused to hire Complainant based on her sex and in reprisal for Complainant's previous filing of an action based on denial of FLA leave. Respondent filed an answer denying the allegations of unlawful employment practices, and the Division commenced an investigation. On July 10, 2001, the Division issued a Finding of Probable Cause crediting the allegations of the complaint. On August 8, 2003, after repeated attempts to settle this matter failed, the Division transmitted this case to the Office of Administrative Law (OAL) for a hearing. The hearing was held on March 31 and April 1, 2004 before ALJ Fidler, and after counsel submitted post-hearing briefs, the record closed on July 19, 2004. The ALJ requested additional time to render his initial decision, which was issued on May 12, 2005. Respondent filed exceptions to the initial decision on or about July 1, 2005, and Complainant filed a reply on August 12, 2005.[2] The Director was granted additional time to file his final decision in this matter, which is now due on November 10, 2005.

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[1]Hereinafter, "ID" shall refer to the written initial decision of the ALJ; "TR" shall refer to the transcript of the administrative hearing held on March 31, 2004 and April 1, 2004; "RE" shall refer to Respondent's exceptions to the initial decision and "CE" shall refer to Complainant's reply to Respondent's exceptions.

[2]On or about August 5, 2005, Respondent filed with the Commissioner of the New Jersey Department of Education (COE), an application for emergent relief asking the COE, among other things, to reject and overturn the ALJ's initial decision in the within matter pending before the Division on Civil Rights. Although Respondent served the Deputy Attorney General prosecuting Complainant's claim with a copy of that filing, and she submitted a reply, Respondent did not serve the undersigned with a copy of that emergent application. On September 23, 2005, the COE Commissioner issued an order dismissing Respondent's petition and denying its application for emergent relief.

THE ALJ'S DECISION

THE ALJ'S FACTUAL DETERMINATIONS

The ALJ set forth the parties' stipulated facts at pages 2 to 4 of the initial decision, which are briefly summarized as follows. Complainant was a tenured teacher employed by Respondent from September 12, 1977 through September 2, 1991. She was on maternity and child care leave from February 15, 1990 through September 1, 1990, and her leave was extended through June 30, 1991. On July 18, 1991, Complainant requested to extend her leave through September 1, 1992 for maternity disability and child care purposes, but Respondent denied that request. In September 1991, Complainant advised Respondent that she would not report for duty on September 3, 1991, alleging rights to leave under the FLA. Complainant did not report for work, and in January 1992 she commenced an action with the Commissioner of Education, seeking an order compelling Respondent to grant her a leave extension to care for her child who suffered from febrile convulsions. Respondent filed tenure charges against Complainant for insubordination and abandoning her position, which were consolidated with Complainant's complaint. Both complaints were settled, with the parties agreeing that Complainant would submit a letter of resignation, and Respondent would provide Complainant with a letter to prospective employers stating that she had resigned and had received consistently positive evaluations.

In July 1999, Complainant applied for a teaching vacancy with Respondent, for which she possessed the required academic certificates. She was interviewed by Respondent's Assistant Principal, Sam Corolla, on August 9, 1999. Respondent's Assistant Superintendent for Personnel, Frank Tanzini, decided not to recommend Complainant for hire. The position was filled by transferring a tenured teacher, Joseph Purcell, from another location in the school district, and his former classes were assigned to two teachers already on staff, one male and one female. On or about September 1, 1999, Respondent hired one male and one female teacher to take over the

social studies classes vacated by the two teachers who took over Purcell's former classes.

The ALJ then summarized the evidence presented, without making specific factual findings in that summary. The following factual findings can be gleaned from the ALJ's discussion. Complainant had over 14 years of experience teaching social studies with an emphasis on psychology, and was well-qualified for the 1999 vacancy at Howell High School. ID 13,17. After deciding not to hire Complainant, Respondent's Assistant Superintendent, Frank Tanzini, did not consider other applicants for the 1999 vacancy, but instead looked at the roster of existing faculty who were certified in social studies and psychology, and asked Marlboro High School teacher Joseph Purcell if he would voluntarily transfer to Howell High to teach psychology. ID 14, 16. The ratio of males to females in the Howell High School Social Studies Department was approximately three to one. ID 14. When Complainant unsuccessfully tried to extend her leave during the 1991-1992 school year, she relied on the FLA and Respondent was aware of this protected activity. ID 15. Assistant Superintendent Tanzini stated during the Division's January 8, 2000 fact finding conference that Respondent did not re-hire Complainant, in part, because there were equally or better qualified candidates. ID 16. During that fact finding conference, Mr. Tanzini heard Respondent's former attorney refer to Complainant's FLA claim when explaining Respondent's reasons for not hiring Complainant, and did not contradict him. Ibid. Mr. Tanzini stated that if he had not seen Complainant's tenure charges in the file, he probably would have recommended hiring Complainant. ID 17. Complainant felt crushed and humiliated as a result of Respondent's rejection of her application, her self-worth was diminished and she was distracted from her normal interactions with her husband and children. Ibid.

THE ALJ'S LEGAL CONCLUSIONS

The ALJ concluded that Complainant established a prima facie case of sex-based failure to hire, and that Respondent met its burden of articulating legitimate non-discriminatory reasons

for deciding not to hire Complainant. ID 13. Shifting the burden to Complainant to show that Respondent's articulated reasons were pretext for sex discrimination, the ALJ concluded that Complainant established that Respondent's non-discriminatory reasons were unworthy of credence. ID14. Specifically, one of Respondent's articulated reasons for not hiring Complainant was that there were equally or better qualified applicants for the position. However, the unrefuted evidence demonstrated that Respondent did not hire any of the other applicants, but instead evaluated the qualifications of teachers already on staff, and solicited a specific teacher for voluntary transfer to the position. In addition, the ALJ concluded that Complainant's unrefuted evidence of an approximately three to one ratio of male to female teachers in the Marlboro High School social studies department is significant evidence that Respondent discriminated against Complainant based on gender. ID 14. The ALJ concluded that Respondent intentionally discriminated against Complainant based on her gender. Ibid.

The ALJ also concluded that Complainant prevailed on her reprisal claim. ID 17. He concluded that Complainant engaged in protected activity by invoking the FLA in her attempts to extend her leave of absence and in appealing the leave denial to the Commissioner of Education, and that references in the 1992 tenure charges showed that Respondent was aware of the FLA-protected activity. ID 15. To complete the prima facie case, the ALJ found a causal connection between the protected activity and Respondent's 1999 decision not to hire Complainant, based on Respondent's former attorney's admission that Complainant's FLA claim was a factor in Respondent's hiring decision. Ibid. The ALJ then concluded that Respondent articulated non-discriminatory reasons for not hiring Complainant, but that Complainant presented persuasive evidence to establish that Respondent's articulated reasons were unworthy of credence, and were pretext for unlawful retaliation. ID 16. The ALJ found that Assistant Superintendent Tanzini failed to contradict Respondent's former attorney when he heard him refer to Complainant's FLA claim

in discussing the reasons for not hiring Complainant. Ibid. The ALJ also found that Mr. Tanzini's statements at the January 8, 2000 fact finding conference - - that Respondent decided not to hire Complainant because she did not interview well, and because there were equally or better qualified candidates - - were inconsistent with each other and with the actual result of soliciting someone already on staff to fill the position. Ibid. The ALJ found it unlikely that Mr. Tanzini would reject Complainant based merely on the presence of tenure charges in her personnel file without looking further to determine the basis of those charges. The ALJ found it "far more likely" that Mr. Tanzini would carefully review the details of the charges and the settlement to make an informed recommendation about her candidacy, and thus would have seen that Complainant invoked the FLA. ID 17. Since Mr. Tanzini testified that he probably would have recommended hiring Complainant if he had not seen tenure charges in her file, and she was qualified, the ALJ found that Respondent failed to prove that it would have rejected Complainant regardless of retaliatory intent. Ibid. The ALJ then concluded that Respondent's decision to reject Complainant for hire was reprisal for her prior FLA claim. Ibid.

The ALJ awarded Complainant $ 92,948.09 in back pay for the period between 1999 and 2003, plus interest, and $50,000 in pain and humiliation damages. The ALJ also ordered Respondent to "reinstate" Complainant to the next available similarly situated position, and ordered back pay to continue until rehire. ID 18-19.

RESPONDENT'S EXCEPTIONS AND COMPLAINANT'S REPLIES

1. Respondent takes exception to the ALJ's failure to consider Complainant's 1993 agreement to submit an "irrevocable letter of resignation" from her prior employment with Respondent. Respondent argues that the resignation letter constituted a forfeiture of all future employment with Respondent, that Complainant's 1999 employment application constituted a breach of the 1993 settlement agreement, and that the ALJ was required to enforce that

settlement. RE 8-10. In response, Complainant first notes that Respondent never raised this claim at the hearing, and that none of Respondent's witnesses testified that this was a reason for rejecting Complainant in 1999. In addition, Complainant argues that an irrevocable resignation letter merely means that it cannot be retracted, and does not constitute a waiver of the right to apply for future employment. CE 2.

2. Respondent takes exception to the ALJ's determination that Complainant was more credible than Mr. Tanzini. Respondent argues that the ALJ erred in not questioning Complainant's credibility in light of Donna Evangelista's contradictory testimony, and also contends that Complainant's testimony in this matter was inconsistent with Complainant's sworn testimony before the OAL in 1993. RE 12-19. In response, Complainant argues that the ALJ's credibility determinations are entitled to deference, are fully supported by the evidence in the record, and are not arbitrary, capricious or unreasonable. Specifically, Complainant notes that as a current employee of Respondent, Donna Evangelista would have motives for being a less than impartial witness, and that Complainant's testimony at the 2004 hearing did not contradict her 1993 testimony, but merely explained her motives for entering into the 1993 settlement. CE 2-3.

3. Respondent takes exception to the ALJ's determination that Tanzini was not credible, and contends that Tanzini never faltered or contradicted himself in testimony. RE 20-22. In response, Complainant reiterates that the ALJ's credibility determinations are entitled to deference, and notes that the ALJ's determinations regarding Tanzini were fully supported by the evidence in the record. CE 3-4.

4. Respondent takes exception to the ALJ's reliance on the DCR investigator's fact finding notes and testimony to discredit Tanzini's sworn testimony. RE 23-27. In response, Complainant notes that Respondent failed to present its former attorney as a witness to contradict the evidence presented by the investigator, and asserts that the evidence relaying that attorney's statements are

party-admissions, which are exceptions to the hearsay rule. N.J.R.E. 803(b). CE 4.

5. Respondent takes exception to the ALJ's conclusion that Respondent's reasons for not hiring Complainant were pretext for gender discrimination. Respondent argues that there is no evidence in the record showing that gender played any role in the hiring decision, and that the lay testimony regarding the gender ratio of the Howell High School social studies department was unreliable and did not constitute competent evidence of discriminatory intent. RE 28-36.

In response, Complainant notes that the ALJ did not find Respondent's witnesses credible on this issue. Complainant argues that expert testimony was not necessary on the gender composition of the social studies department, and her lay testimony was sufficient and based on personal knowledge. Complainant argues that the ALJ's disbelief of Respondent's articulated reasons for rejecting Complainant, combined with Complainant's prima facie case, are sufficient to show a discriminatory intent. Complainant contends that Respondent has provided no support for its argument that the gender composition of the social studies department is irrelevant to proving gender discrimination, nor has Respondent rebutted Complainant's evidence of the male/female teacher ratio in that department. CE 4-5.

6. Respondent takes exception to the ALJ's conclusion that there was a causal link between Complainant's prior FLA complaint and the 1999 failure to hire. RE 37-38. In response, Complainant cites evidence in the record that Respondent was aware of her FLA protected activity, and notes that the ALJ did not find it credible that Tanzini would have decided to reject Complainant without completely reading the tenure charge document that referred to her FLA claim. Complainant also argues that the lapse of time between her FLA protected activity and Respondent's adverse action is not significant under New Jersey law. CE 5-6.

7. Respondent takes exception to the ALJ's conclusion that Respondent's articulated reason for not hiring Complainant was pretext for retaliatory intent. RE 39-42. In response,

Complainant argues that the ALJ's conclusion was based on his finding that Mr. Tanzini was not credible, which is within the ALJ's discretion, and that the ALJ's conclusion was appropriately based on inconsistencies in Respondent's articulated reasons for rejecting her. CE 6.

8. Respondent takes exception to the ALJ's failure to consider Respondent's status as a public entity in awarding damages, attorney fees and costs. RE 43-44. In response, Complainant notes that public employers are subject to the LAD, and LAD amendments addressing damage awards have given no indication that public entities are to be treated differently. Complainant argues that prior decisions addressing public entity status of a payor have dealt specifically with punitive damages and pain and humiliation. Complainant also argues that taxpayers will bear the burden if Respondent is absolved of paying the Division's attorney fees. CE 6-7.

9. Respondent takes exception to the ALJ's backpay calculations, contending that Respondent had no obligation to hire Complainant at a specific salary step, and that Complainant failed to mitigate damages. RE 45-47. In response, Complainant argues that based on her teaching experience and positive performance record, it is unlikely that she would have been offered a new teacher's starting salary. Complainant also argues that, because she was on approved leave until September 1991, the ALJ started her backpay at the correct salary step. Complainant argues that evidence of her work search and self-employment as a tutor and home instructor support the ALJ's conclusion that she mitigated damages. CE 7-8.

10. Respondent takes exception to the ALJ's award of pre-judgment interest against a public entity. RE 48-49. In response, Complainant cites a recent Appellate Division case, as well as prior decisions of the Director, to support the conclusion that pre-judgment interest may be awarded against public entities in LAD cases. CE 8.

11. Respondent takes exception to the ALJ's order that Respondent reinstate Complainant, arguing that "reinstatement" is inappropriate because Complainant was no longer employed at the

time of alleged discrimination, and that hiring Complainant is too extreme a remedy to impose on a public entity. RE 50-51. In response, Complainant cites caselaw ordering instatement as a remedy under the LAD. Complainant also argues that Respondent has presented no evidence to support its claim that the community would be detrimentally affected if Respondent hired Complainant as a teacher. CE 8-9.

12. Respondent takes exception to the ALJ's decision to admit into evidence a March 30, 2004 note from Complainant's gastroenterologist. RE 52-56. In response, Complainant argues that Respondent never objected to the authenticity of the document, but only objected that it was untimely produced and constituted hearsay. Complainant notes that hearsay is admissible in OAL hearings, with the ALJ to determine the weight any evidence is given. CE 9.

13. Respondent takes exception to the ALJ's award of $50,000 in damages for pain and suffering. RE 57-59. In response, Complainant argues that the ALJ found Complainant's testimony credible, and that it was corroborated by her husband's testimony and the note from her physician. Complainant argues that damages are not limited to physical symptoms or severe reactions, and that her subjective reactions are relevant. Complainant notes that the LAD was amended in 2003 to provide for emotional distress damage awards in LAD cases before the Division to the same extent as in common law tort actions. CE 9-10.

THE DIRECTOR'S DECISION

THE DIRECTOR'S FACTUAL FINDINGS

The Director concludes that the ALJ's factual findings are supported by the evidence in the record, and adopts them as his own. In doing so, the Director has considered and rejected Respondent's exceptions regarding the ALJ's credibility determinations. RE 12-27. Except as specifically discussed below regarding Respondent's alleged gender-motivated bias, the Director finds insufficient evidence in the record to reject any of the factual findings the ALJ reached based on his assessment of the credibility of Complainant or Respondent's witnesses.

THE DIRECTOR'S ANALYSIS AND LEGAL CONCLUSIONS

A. Reprisal

To establish a prima facie case of unlawful reprisal, Complainant must show that she engaged in protected activity known to Respondent, that Respondent thereafter subjected her to adverse employment action, and that there is a causal connection between her protected activity and the adverse action. Romano v. Brown and Williamson Tobacco, 284 N.J. Super. 543, 548-49 (App. Div. 1995). In its exceptions, Respondent argues that the ALJ erred in concluding that Complainant established a causal connection between her 1991/1992 protected activity and the 1999 failure to hire. The Director finds no merit in Respondent's contention that the time gap between the two events is too long for an inference of causation. RE 37. In Romano, supra, the Appellate Division noted that although temporal proximity may be evidence of causation, a lengthy time gap, in that case 10 years, does not necessarily lead to the conclusion that there is no causal connection. Id. at 549-550. The Director adopts the ALJ's conclusion that Complainant presented a prima facie case of unlawful reprisal.

The burden then shifts to Respondent to articulate a legitimate, non-retaliatory reason for rejecting Complainant. Id. at 549. The Director concludes that Respondent met this burden by articulating several reasons for its decision - - that Complainant did not interview well, that there were equal or better qualified candidates, that Complainant had not been teaching for several years, that tenure charges had been filed against her, and that she had abandoned her job and was insubordinate. ID 13.

Complainant then bears the burden of showing that Respondent's articulated reasons were not its true motivation, and that Respondent was actually motivated by retaliatory intent. Ibid. Complainant may do this either directly by showing that retaliation more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Ibid. In order to prevail, a complainant is not required to prove that the respondent was motivated solely by a discriminatory purpose. Slohoda v. United Parcel Services, Inc., 207 N.J. Super. 145, 155 (App. Div. 1986)(citations omitted), certif. denied, 104 N.J. 400. "It is sufficient if, taken with other possibly meritorious reasons, the discriminatory purpose was 'a determinative factor'" in the employer's decision. Ibid. The Director concludes that Complainant has met her burden of proving pretext.

In its exceptions, Respondent argues that there is no evidence to support the ALJ's conclusion that Respondent's articulated reasons for rejecting Complainant were pretext for retaliation. RE 39. First, Respondent contends that Respondent's prior attorney's statement that Complainant's "past history" was a factor in Respondent's decision to reject her was not inconsistent with Mr. Tanzini's testimony that he rejected Complainant because of tenure charges. RE 39-40. Second, Respondent contends that it is illogical to conclude that Mr. Tanzini's proffer of more than one reason for rejecting Complainant impairs his credibility, as his reasons were credible and not contradictory. Third, Respondent contends there is no evidence to support the

ALJ's conclusion that it was unlikely that Mr. Tanzini merely saw that there were tenure charges in Complainant's file, but did not look further and see that Complainant raised FLA claims.

The ALJ's finding of pretext was based, pure and simple, on his finding that Tanzini was not a credible witness. The Director may not reject or modify factual findings based on the ALJ's credibility determinations unless they are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent and credible evidence. N.J.A.C. 1:1-18.6(c). It is the ALJ who had the opportunity to observe the demeanor of the witnesses at the hearing and to judge their credibility. Clowes v. Terminix International, Inc., 109 N.J. 575, 578 (1988). Respondent gave a number of reasons for rejecting Complainant's application. Rejection based on a combination of reasons is not necessarily evidence of discrimination, however, where an employer changes its reasons and provides different explanations at different times, the inconsistency may be evidence that a statement or a witness is not credible.

Mr. Tanzini testified that he decided to reject Complainant's application when he saw that Respondent had previously filed tenure charges against her, and that he did not read the settlement agreement or look into the substance or circumstances of those tenure charges before making his decision. TR 3/31/04, p. 146-147. The ALJ found it unlikely that Mr. Tanzini, upon seeing the tenure charges in Complainant's file, would have decided to reject her without reviewing the contents of those charges, thereby learning that Complainant had invoked the FLA in her efforts to retain her job. ID 16-17. Respondent characterizes the ALJ's conclusion as "speculation." RE 42. However, the ALJ's conclusion is nothing less than a determination that Mr. Tanzini was not credible when he asserted that he never read the tenure charges or FLA references.

Respondent also argues that Mr. Tanzini has consistently testified throughout the hearing that he did not know of the prior FLA claim when he decided to reject Complainant, and that

Complainant presented insufficient evidence to contradict his testimony. RE 22. Despite the fact that Tanzini never deviated from this contention in his testimony, it is well within the ALJ's discretion to disbelieve him. In concluding that Mr. Tanzini was not credible on this issue, the ALJ relied on the fact that Mr. Tanzini had substantial experience as an administrator but had only recently joined Respondent's administration. ID 16. The ALJ, in essence, found it illogical that someone in Mr. Tanzini's position would not even make a cursory review of the substance of tenure charges before relying on them to reject Complainant. It is the ALJ's responsibility to make credibility determinations, and evaluations of the rationality of witness statements are integral and necessary to such credibility determinations. The Director adopts the ALJ's conclusion that Respondent's articulated reasons for rejecting Complainant were pretext for retaliatory intent.

Respondent then bears the burden of proving that Complainant would not have been hired even without its retaliatory or discriminatory motives. Jamison v. Rockaway Township BOE, 242 N.J. Super. 436, 447(App. Div. 1990). The ALJ concluded that Respondent did not meet this burden. He relied on Mr. Tanzini's statement that he would not have rejected Complainant if he had not seen the tenure charges in her file. ID 17. The Director adopts this conclusion, as it is supported by the record, and based on the ALJ's credibility determinations. Although Respondent articulated other alleged criticisms of Complainant's qualifications for the position, such as Mr. Corolla's failure to recommend her for immediate hire, her gap in teaching service and the presence of other qualified candidates, all of these are contradicted by Mr. Tanzini's representation that he would have hired her "but for" the tenure charges. Accordingly, Respondent has not met its burden of proving that it would have rejected her even if it had not considered the FLA-protected activity in relation to the tenure charges. The Director adopts the ALJ's conclusion that Respondent rejected Complainant for hire in reprisal for protected activity, in violation of the FLA. N.J.S.A. 34:11B-9.

B. Gender Discrimination

In the absence of direct evidence, a complainant must establish a prima facie case of discriminatory failure to hire by proving that she is a member of a protected class, that she was qualified for the position sought, that she was rejected despite her qualifications, and that the employer continued to seek applicants of similar qualifications for the vacancy after rejecting her. Andersen v. Exxon Co., 89 N.J. 483, 492 (1982). The Director adopts the ALJ's conclusion that Complainant established a prima facie case.

Once a complainant has established a prima facie case, the burden of production, but not the burden of persuasion, then shifts to the respondent to articulate some legitimate nondiscriminatory reason for the adverse action. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981); see Andersen v. Exxon, supra, 89 N.J. at 493. The Director adopts the ALJ's conclusion that Respondent met its burden of articulating non-discriminatory reasons for rejecting Complainant. These are the same reasons addressed in evaluating Complainant's reprisal claim, above.

Once Respondent meets this burden of production, the presumption of discrimination raised by Complainant's prima facie showing of gender discrimination is rebutted. Complainant then must prove by a preponderance of the evidence that Respondent's articulated reasons were pretextual and that it was actually motivated by gender discrimination. Goodman v. London Metals Exch., Inc., 86 N.J. 19, 32 (1981).

The ALJ concluded that Complainant met this burden by showing that Respondent's articulated reasons for rejecting her were unworthy of credence. ID 14. However, the ALJ's analysis overlooks the requirement that Complainant prove not only that Respondent's articulated reasons were not credible, but also that those reasons were a mask or cover for sex discrimination.

The burden shifting analysis was developed because direct evidence of discrimination is

usually unavailable. Because people do not normally act in a totally arbitrary manner, the circumstantial evidence methodology is based on the presumption that, where challenged actions are otherwise unexplained, they are more likely than not based on impermissible factors. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). Here, as discussed above, the evidence presented demonstrates that Respondent rejected Complainant in retaliation for her prior FLA-protected activity. Hence, the employer's action is no longer "unexplained," and it is not reasonable to automatically presume that Respondent's articulated reasons were fabricated to mask sex discrimination as well as unlawful reprisal. Complainant bears the ultimate burden of proving her claims of discrimination. See, e.g. Kelly v. Bally's Grand Hotel/Casino, 285 N.J. Super. 422, 433 (App. Div. 1995). Although a complainant may succeed in proving that the employer was motivated by more than one discriminatory factor, in this case the rationale for concluding that Respondent retaliated against Complainant is inconsistent with a finding that she was rejected because she is female.

In concluding that Respondent unlawfully retaliated against Complainant, the ALJ specifically relied on Mr. Tanzini's statement that he probably would not have rejected Complainant if he had not seen the tenure charges in her file. ID 17. It would be arbitrary and capricious to rely on this statement as evidence of unlawful reprisal, but to ignore or reject it as evidence relating to gender discrimination. The ALJ ultimately concluded that, in relying on the tenure charges to reject Complainant, Mr. Tanzini knew of -- and was motivated by -- the fact that the tenure charges related to Complainant's FLA-related protected activity. ID 17-18. In essence, the ALJ concluded that "but for" the unlawful retaliation, Respondent would have hired Complainant. Thus, accepting the fact that Mr. Tanzini was ready to recommend Complainant for hire until he saw the tenure charges, it is inconsistent to also conclude that Respondent rejected her, even in part, because of her gender.

The ALJ also relied on Complainant's testimony that there were three times as many male teachers as females in the Howell High School social studies department as evidence of gender discrimination. ID 14. The Director finds no merit in Respondent's contention that expert testimony is required for consideration of such statistical evidence. RE 32. Moreover, although Respondent challenges the veracity of Complainant's ratios and the manner in which Complainant compiled her numerical evidence, the record reflects that Respondent failed to provide its own figures in response to Complainant's discovery request. TR 3/31/04, p. 149-150. However, Complainant's statistical evidence is insufficient to support the conclusion that Respondent rejected Complainant based on her gender.

Complainant testified that there were approximately three males for every female in the social studies department at Marlboro High School throughout her tenure there, and since 1977, the same was true for Howell High School and any other school in the district. TR 3/31/04, p.30, 50. Although statistical evidence may be relevant to a showing of pretext, raw numbers showing under-representation of a protected class are not necessarily probative of discriminatory motive without analysis of "either the qualified applicant pool or the flow of qualified candidates over a relevant time period." Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F. 2d 509, 543 (3rd Cir. 1993).

Complainant has not provided any evidence of the gender composition of the qualified applicant pool, or of the specific applicants for this position or other positions in this department. Given Respondent's evidence of a district-wide overrepresentation of females, and Tanzini's role in "recommending" hires for the entire district, underrepresentation in the HHS social studies department is insufficient to conclude that there is anti-female bias in the hiring process. Complainant bears the ultimate burden of proving that her gender was a motivating factor in Respondent's decision to reject her for hire. Especially since the same ratio was in effect when

Respondent did hire her in 1977, it is not rational to conclude that the ratio alone is probative of anti-female bias.

Complainant argues that discrediting the employer's articulated reasons, coupled with the elements of Complainant's prima facie case are sufficient to prove discriminatory intent. CE 5. While there is caselaw holding that such a showing may suffice to permit a trier of fact to infer that there was intentional discrimination, such evidence does not compel such a conclusion. Kelly v. Bally's Grand Hotel/Casino, 285 N.J. Super. 422, 433 (App. Div. 1995); Fleming v. Correctional Healthcare Solutions, Inc., 164 N.J. 90, 101 (2000). As discussed above, the evidence demonstrating that Complainant would have been hired "but for" Respondent's unlawful reprisal is patently inconsistent with the conclusion that Respondent was also motivated by gender bias in rejecting her. Thus, the ALJ's inference of gender discrimination is not supported by the evidence in the record, and the Director rejects the ALJ's conclusion that Respondent refused to hire Complainant based on her gender in violation of the LAD.

C. Remedies

1. Equitable Relief

The Director adopts the ALJ's award of backpay with interest, and his ruling that Respondent hire Complainant when a suitable position next becomes available, and to continue "backpay" (actually frontpay) until she is instated. ID 18. Although the ALJ ruled that Respondent should hire Complainant for a position "sufficiently similar" to the one she was denied, it is appropriate to recognize that a psychology or social studies teaching vacancy may not soon be available, and that Complainant may be qualified to teach in other subject areas. To balance the mitigation of damages requirement with the goal of restoring Complainant to the position she would be in if she had not suffered discrimination, the Director orders that Respondent hire Complainant for the next teaching vacancy for which she possesses the required certifications, and if that

position is not in her field of specialty, Respondent shall provide her with the opportunity to transfer to the next vacancy for a position similar to the one she was denied. She should be hired at the salary level equal to the frontpay she is receiving at the time of her appointment.

Respondent takes exception to the ALJ's award of backpay beginning at $37,487, which is step 8 of its salary guide. RE 46, Ex. R-6. Respondent argues that, at best, Complainant would have started at step 7, but that her prior salary step is not determinative. Ibid. Respondent requests that, if backpay is upheld, the parties should be permitted to present additional evidence and testimony on the factors to be considered in determining the appropriate pay rate. Ibid. Respondent has not shown good cause for supplementing the record with additional evidence on this issue, as the issue was addressed by both parties at the hearing, the salary guide and Complainant's salary history were moved into evidence by Respondent, and Respondent's witness testified, both on direct and cross examination, about the salary guide and Complainant's salary history. TR. 3/31/04, p. 132-133, 150-152. Respondent was on notice that backpay was an available remedy in this case, and had an obligation to present all evidence on this issue before the record closed. Respondent has not shown that the additional evidence it now wishes to present was unavailable or is newly discovered, nor has it shown other good cause to supplement the record.

The Director finds that it was reasonable for the ALJ to use Respondent's salary guide to determine the amount of backpay to be awarded, but that the evidence does not support starting Complainant's backpay at step 8. Mr. Tanzini testified that Respondent's rule is that a teacher on leave for a full year does not move up a step when he or she returns, but that a teacher who works half a year, or 94 days, would start at the next step. TR 3/31/05, p.152. Complainant testified that she left at step six or seven, and that Respondent could have started her at the step she left at, "which they didn't have to do." TR 3/31/04, p.37. Complainant's salary record shows that she was

paid at step 6 for the last months she actively taught, during the 1989-1990 school year. Although the same document also includes notations showing salary step 7 for the 1990-1991 school year, it appears to be undisputed that she was not paid for that school year, and hence was never paid at step 7. Ex. R-6, p.2. When asked to explain why her damage report requested backpay starting at step 8, Complainant testified that she knew of two other teachers in the district who started at the next salary step after an extended leave of absence, one of whom, Cindy Popiel, was on leave for a few years. TR. 3/31/04, p. 109-113. Although Complainant testified that Respondent placed these teachers on the following step when they returned, she did not present evidence or even testify as to whether they had been paid at the prior step for any part of the time they last taught before beginning their leave. Complainant did not testify that Popiel or the other teacher completely skipped a step, which is what she now seeks to do. There is no evidence in the record directly refuting Mr. Tanzini's testimony regarding Respondent's policy for adjusting salary steps when employees return from approved leave. Moreover, in Complainant's case, since she would have been a new hire rather than an employee returning from approved leave in 1999, Respondent's salary scales and related policies are not necessarily determinative, but are merely a reasonable guide for determining the salary she would have received if hired.

For these reasons, the Director concludes that Complainant's back pay should commence at step 7 of Respondent's salary scales. The Director adopts the remainder of the ALJ's conclusions, and awards back pay based on the assumption that Complainant's contract would have been renewed with a step increase each year. ID 17-18.

Respondent argues that the ALJ erred in awarding pre-judgment interest on the backpay award, because Respondent is a public entity. There is no merit to this argument. The Appellate Division recently removed any doubt that prejudgment interest may be awarded against public entities in LAD actions. Potente v. County of Hudson, 378 N.J. Super. 40, 49 (App. Div. 2005).

The ALJ calculated backpay only through 2003. The record does not include Respondent's salary scales on which the ALJ's backpay figure was based or the salary scales for subsequent years. Respondent shall submit to the Director and to Complainant, within 2 weeks, the salary scales for each year from the 1999/2001 school year, through and including the current 2005/2006 school year. The Director will leave the record open for a total of 30 days to permit the parties to attempt to stipulate to the amount of backpay due through the date of this order, and a per diem figure for the remainder of the current schoolyear, based on the ruling in the within Order that backpay is to start at step 7 and be increased one step each year.

Respondent also argues that Complainant failed to mitigate damages. RE 47. Although the ALJ summarized Complainant's testimony regarding her efforts to find other employment, ID 7, he did not specifically address mitigation.

Failure to mitigate damages is an affirmative defense, and the employer bears the burden of proving that the employee's mitigation efforts were not reasonable. Goodman v. London Metals Exchange, supra, 86 N.J. at 40. The employer establishes a prima facie case of failure to mitigate by showing that employment opportunities comparable to the wrongfully lost position were available, and if the lowered sights doctrine is applicable, that there were other suitable jobs. Id. at 41. The burden then shifts to the employee to present evidence that there were no comparable jobs available, that she made reasonable and diligent efforts to find appropriate work, but was unsuccessful, or that the circumstances did not justify acceptance of a dissimilar job. Ibid.

Here, Respondent presented no evidence at the hearing of comparable teaching vacancies or other available jobs that would have been suitable for Complainant, nor has it even proffered such evidence in post-hearing submissions. In its exceptions, Respondent merely states that it is "extremely unlikely" that there were only seven teaching positions available during the five years between Complainant's rejection and the hearing. RE 47. As Respondent has not made a prima

facie showing of failure to mitigate damages, and in light of the evidence that Complainant earned income doing tutoring and home instruction every year since 1999, and also applied for full time teaching jobs, Ex. P-12, P-13, TR 3/31/04, p. 37, the Director concludes that Complainant did not fail to properly mitigate damages.

The ALJ ordered Respondent to hire Complainant for the next available full time teaching position. ID 18. In reaching this conclusion, he cited some caselaw addressing policy issues relating to when reinstatement is a suitable remedy and whether or not an existing employee should be displaced. ID 18. In its exceptions, Respondent argues that because Complainant was no longer employed by Respondent when she applied in 1999, she cannot be "reinstated." RE 50. Respondent's argument is misplaced, as the ALJ's decision stated that Complainant be hired; he used the word reinstatement when citing caselaw addressing the analogous situation of reinstatement after unlawful termination. Both hiring and reinstatement are appropriate remedies under the FLA and the LAD, and it is appropriate to apply the same policy considerations to both in determining whether animosity makes the remedy inappropriate, and whether it is appropriate to displace an existing employee to instate the discrimination victim. See, e.g., Kraemer v. Franklin and Marshall College, 941 F. Supp. 479, 481-482 (E.D. Pa. 1996).

Respondent also argues that it should not be ordered to hire Complainant, because it is a public entity and the students and community will be detrimentally affected. RE 50. There is no merit to this argument. There is no exemption in the FLA for public entities, either in employees' rights or in remedies. Moreover, Respondent's contention that the ALJ's recommended decision forces Respondent to choose between displacing an existing teacher or rejecting a qualified applicant to give Complainant a position, RE 50, is at best misleading. The ALJ unequivocally rejected the option of "bumping" or displacing an existing teacher. ID 18. Instead, the order will disadvantage no one other than a new applicant, who has no higher right to a job with Respondent

than Complainant. The Director concludes that hiring is an appropriate remedy in this case.

In its exceptions, Respondent raises for the first time the argument that the terms of the parties' 1993 settlement agreement bar Complainant from forever applying for new employment with Respondent, and that Complainant breached that settlement agreement by even applying for the 1999 vacancy. RE 8-11. Specifically, Respondent argues that because Complainant agreed to, and did, irrevocably resign from the tenured position at Marlboro High School she held until September 1991, she forfeited her right to apply for a teaching job at Howell High School, or any other job with Respondent, ever. There is no merit to this argument. "Irrevocable" means that it cannot be rescinded or revoked. Rescinding or revoking a resignation letter would place an employee in the same position he or she was in before resigning. Complainant's 1999 job application sought to do no such thing. In 1999, Complainant submitted a resume and letter requesting to be considered, as a new applicant, for a teaching vacancy at a different school within Respondent's district. There is no manner in which the 1993 settlement agreement or administrative decision can be read to preclude Complainant from re-applying for employment with Respondent, even in her old school and old department. It is not uncommon for settlements of employment-related complaints to include an agreement that the former employee/litigant will not apply for employment with the former employer. Respondent failed to demand such a waiver or forfeiture when it entered into the settlement in 1993, and there is no basis for inferring such a waiver now.

2. <u>Compensatory Damages</u>

The ALJ awarded Complainant $50,000 in pain and humiliation damages. ID 17. Respondent argues that this award is excessive, unsupported by the evidence, and that the ALJ erred in admitting a note from Complainant's physician, Ex. P-18, in support of her claim for pain and humiliation damages. RE 52-59.

Regarding the physician's note, Respondent argues that the ALJ erred in admitting it into evidence because it was not authenticated and the author/physician was not available for cross-examination. RE 52-56. N.J.A.C. 1:1-15.6, cited by Respondent, permits a judge to require authentication when a party raises questions regarding the authenticity of the document. Since Respondent raised absolutely no issues or objections regarding the authenticity of the physician's note at the hearing, the ALJ did not err in admitting it without authentication. The ALJ correctly ruled that hearsay is admissible in administrative hearings, and noted that he would consider Respondent's inability to cross-examine the author and lack of advance notice when deciding the weight to accord this evidence. TR 3/31/04, p.33-34, 46. The Director concludes that the ALJ did not err in admitting Ex. P-18 into evidence.

Respondent also contends that the Director is only authorized to award minor or incidental awards for pain and humiliation, and cites caselaw in support of this argument. RE 59. Although the cases cited by Respondent may have supported its argument prior to 2004, a recent amendment to the LAD makes it clear that emotional distress damages are available in LAD actions filed with the Division to the same extent as in common law tort actions. N.J.S.A. 10:5-17. All remedies available under the LAD are applicable to the FLA. N.J.S.A. 34:11B-11. As the LAD and FLA are remedial statutes, an amendment expanding the statutory remedies may be given retrospective effect where it is applied for redress of a pre-existing actionable wrong. State Dept. of Environmental Protection v. Arlington Warehouse, 203 N.J. Super. 9 (App. Div.1981); In re D'Aconti, 316 N.J. Super. 1(App. Div. 1998). Here, reprisal for protected activity has been a violation of the FLA since its enactment, so there is no bar to applying the expanded remedies to this case. Moreover, the FLA itself provides more expansive remedies to employees than the LAD, as the FLA gives the Director the power to award punitive as well as compensatory damages. Ibid. Since even punitive damages are available for FLA violations, there is no question that the

Director is empowered to award substantial compensatory damages in FLA cases, consistent with the proofs presented.

A victim of unlawful discrimination under the LAD is entitled to recover non-economic losses such as mental anguish or emotional distress proximately related to unlawful discrimination. Anderson v. Exxon Co., 89 N.J. 483, 502-503 (1982); Director, Div. on Civil Rights v. Slumber, Inc., 166 N.J. Super. 95 (App. Div. 1979), mod. on other grounds, 82 N.J. 412 (1980); Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399 (1973). Such awards are within the Director's discretion because they further the LAD's objective to make the complainant whole. Andersen, supra, 89 N.J. at 502; Goodman, supra, 86 N.J. at 35.

A victim of discrimination is entitled, at a minimum, to a threshold pain and humiliation award for enduring the "indignity" which may be presumed to be the "natural and proximate" result of discrimination. Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 312-313, 317 (Ch. Div. 1970). Thus, pain and humiliation awards are not limited to instances where the complainant sought medical treatment or exhibited severe manifestations. Id. at 318. Nor is expert testimony needed. See, e.g., Rendine v. Pantzer, 276 N.J. Super. 398, 440(App. Div. 1994), affirmed as modified, 141 N.J. 292 (1995).

Here, Complainant's own testimony, as well as that of her husband, demonstrate that Complainant suffered emotional distress as a result of Respondent's refusal to hire her back into the school district she had worked in, with good performance ratings, for almost fourteen years. Complainant testified that after she was not selected for the job, she felt crushed, humiliated and her self-esteem was lowered. TR 3/31/04, p. 31. Complainant's husband testified that after she was not selected for the job, Complainant became more anxious, upset and irritable. TR 3/31/04, p. 89-91. Both Complainant and her husband testified that her family life suffered, and she couldn't devote as much time to her children. TR 3/31/04, p. 34, 89-90. Complainant testified that

shortly after not getting the job, she developed stomach problems, an ulcer and consulted a gastroenterologist. TR 3/31/04, p. 31-32. She testified that there were no other events in her life that would have contributed to the stress and aggravation she experienced. TR 3/31/04, p. 34-35. Complainant's husband testified that Complainant's gastroenterologist prescribed three different medications, and she continued to experience pain and symptoms, including reflux, almost daily. TR 3/31/04, p.89-90.

Respondent contends that Complainant testified at length about her daughter's medical condition, and failed to distinguish the distress she suffered in reaction to her daughter's problems from her reactions to Respondent's failure to hire her. RE 57. The hearing transcripts do not support this contention. Complainant testified that her daughter's seizures began when her son was born in 1990, and continued until roughly 1994. TR 3/31/04, p. 23, 61. That testimony was in response to a completely different line of questioning, and was distinct from her testimony about her physical and emotional reactions to the discriminatory failure to hire. The testimony relied upon by the Director and the ALJ clearly addressed only Complainant's reactions to the 1999 failure to hire. TR 3/31/04, p 31-35.

The Director awards pain and humiliation damages based on the extent and duration of emotional suffering experienced by each complainant. After reviewing the record in its entirety, and considering emotional distress damage awards made to other prevailing complainants, the Director concludes that, although Complainant's emotional suffering was significant, an award of $50,000 in pain and humiliation damages is excessive in this case. Based on the specific events and circumstances of this case, where Complainant was rejected for hire by her former employer in retaliation for asserting the right to take leave under the FLA, the Director concludes that an award of $25,000 is appropriate to fully compensate Complainant for the emotional distress she suffered as a result of Respondent's unlawful actions.

3. Punitive Damages

The Director adopts the ALJ's conclusion that no punitive damages should be assessed in this case. ID 19.

4. Penalties

In addition to any other remedies, the FLA provides that the Director shall impose a penalty payable to the State Treasury against any employer who violates this statute. N.J.S.A. 34:11B-10. The maximum penalty for a first violation of the FLA is $2,000. Ibid. After review of the record, the Director concludes that the maximum penalty of $2,000 is appropriate for Respondent's FLA violation.

5. Counsel Fees

A prevailing party in a FLA action may be awarded reasonable attorneys' fees. N.J.S.A. 34:11B-12. It is a fee-shifting statute, subject to the holding of Rendine v. Pantzer, 141 N.J. 292 (1995). DePalma v. Bldg. Inspection Underwriters, 350 N.J. Super. 195, 218 (App. Div. 2002). The Director concludes that it is appropriate to make an award of attorney fees in this case.

Respondent contends that its status as a public entity should be considered in assessing the amount of reasonable attorneys' fees. RE 43-44. Respondent relies on a balancing test applied by the Appellate Division in Yakel-Kremski v. Denville Tp. Bd. Of Educ., 329 N.J. Super. 567 (App. Div. 2000), which, in addition to other factors, balances the public interest in fully reimbursing plaintiff's economic losses against the fact that limited public funds are available for such payments. Id. at 574, citing Furey v. County of Ocean, 287 N.J. Super. 42, 45 (App. Div. 1996). Both Yakel-Kremski and Furey addressed fee awards under the Tort Claims Act (TCA), N.J.S.A. 59:9-5, a statute which raises policy issues that differ significantly from the policies

underlying the fee shifting provisions of the LAD.[3] In actions under the TCA, the defendant is always a public entity or public employee, and for that reason the public entity status of the payor has implications that go to the crux of that statute. See also, Potente v. County of Hudson, 378 N.J. Super. 40, 49 (App. Div. 2005), noting the fundamental differences between the LAD and the TCA.

Under the TCA, the statutory purpose is to award "reasonable attorney fees which are sufficient to compensate the attorney for the work performed, while seeking neither to encourage nor discourage attorneys from undertaking meritorious causes of action against the governmental entity or its employees." Furey, supra, 287 N.J. Super. at 46. In contrast, under Rendine, supra, in appropriate cases an enhancement is added to market rates to encourage attorneys to take cases in which there is a risk of nonpayment. Such fee enhancements carry out the public policy goal of affirmatively assisting discrimination victims to compete in the market for legal services. Thus, the fee shifting provisions of the LAD and FLA differ markedly from the fee provisions of the TCA, and the cases considering the public entity status of the employer are not controlling in this case.

The Director will leave the record open for a total of 30 days to permit the parties to attempt to reach an amicable resolution of the issues relating to counsel fees, or if that is not possible, to submit briefs and/or certifications addressing the fee award. Complainants shall file with the Division and serve on Respondent any submissions within 20 days, and Respondent shall have 10 days to file and serve a reply.

[3]When citing LAD cases regarding the import of a contingency agreement in assessing a fee award, the court in Furey specifically noted that it did not mean to imply that the policy considerations under the LAD are the same as those applicable to Tort Claims actions against public entities or public employees. 287 N.J.Super. at 46.

ORDER

Based on all of the above, the Director concludes that Respondent subjected Complainant to unlawful reprisal in violation of the NJFLA. Therefore, the Director orders as follows:

1. Respondent and its agents, employees and assigns shall cease and desist from doing any act prohibited by the New Jersey Family Leave Act, N.J.S.A. 34:11B-1 to -16.

2. Within 45 days from the issuance of the final order in this matter, Respondent shall forward to the Division a certified check payable to Complainant in the amount of $25,000 as compensation for her pain and humiliation.

3. Within 45 days from the issuance of the final order in this matter, Respondent shall forward to the Division a certified check payable to "Treasurer, State of New Jersey," in the amount of $2,000 as a statutory penalty.

4. The penalty and all payments to be made by Respondent under this order shall be forwarded to Richard Salmastrelli, New Jersey Division on Civil Rights, P.O. Box 089, Trenton, New Jersey 08625.

5. Any late payments will be subject to post-judgment interest calculated as prescribed by the Rules Governing the Courts of New Jersey, from the due date until such time payment is received by the Division.

6. Respondent shall hire Complainant for the next available teaching vacancy for which she has the required certifications, and provide her with the opportunity to transfer to the next vacancy in the social studies department.

7. Complainant shall receive frontpay for the period starting on the date of the within order, and ending on the date of Respondent hires Complainant for the next available teaching vacancy. Frontpay shall be paid at the same rate Complainant receives for backpay for the current (2005/2006) schoolyear, less Complainant's actual earnings. Complainant shall submit

documentation to Respondent of her actual earnings for the frontpay period through a certification, W-2 forms and/or other reliable income records. Frontpay shall be paid by Respondent in a lump sum at the time Complainant is hired, with accrued interest at the rates set by the New Jersey Court Rules, from the date of the within order until the date of hire.

8. The record in this matter shall remain open for 30 days for the limited purpose of calculating the amount of backpay due to Complainant, and the amount of counsel fees. Respondent shall provide to the Director and Complainant, within 2 weeks, copies of its salary scales from the 1999/2000 school year through the 2005/2006 school year, and the parties shall communicate to determine whether they can stipulate to the amount of backpay due under the terms of the within order, and a per diem rate for the current schoolyear. The parties shall also attempt to amicably resolve the amount of counsel fees due, and if they are unsuccessful, Complainant shall file with the Division and serve on Respondent, within 20 days of this order, a certification of services and related certifications as to the reasonable hourly rate for counsel's work and briefs if desired. Respondent shall have 10 days to file and serve a reply. The Director will then issue a supplemental order limited to addressing these issues.

_____ _____

DATE J. FRANK VESPA-PAPALEO, ESQ.
DIRECTOR, DIVISION ON CIVIL RIGHTS